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IN THE
SUPREME COURT OF THE UNITED STATES

No. 83-5365

OCTOBER TERM, 1983

CHARLIE YOUNG, JR.

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I.

Whether the Supreme Court of Georgia properly determined that Petitioner could be resentenced utilizing statutory aggravating circumstances previously found by the jury in Petitioner's first sentencing trial, where the United States Court of Appeals for the Eleventh Circuit had reversed Petitioner's sentence, but had not reversed the sentence on the basis that there was insufficient evidence to support the aggravating circumstances.

II.

Whether, as a matter of state interpretation of state law, double jeopardy principles do not apply to aggravating circumstances, so as to prevent the submission of an additional aggravating circumstance to the jury at Petitioner's new trial as to sentence?

III.

Whether the Supreme Court of Georgia properly interpreted the decision of the United States Court of Appeals for the Eleventh Circuit in Young v. Zant, 677 F.2d 792 (11th Cir. 1982), as substituting its opinion for that rendered by the district court, so as to reverse the finding of the district court that the aggravating circumstances utilized at Petitioner's first trial as to sentencing were unsupported by the evidence?

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SUPREME COURT OF THE UNITED STATES

No. 83-5365

OCTOBER TERM, 1983

CHARLIE YOUNG, JR.

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

PART ONE

STATEMENT OF THE FACTS

Petitioner, Charlie Young, Jr., was tried in the Superior Court of Greene County on charges of murder, armed robbery, and robbery by intimidation on February 18 and 19, 1976. Petitioner received the death sentence for the offense of murder, a life sentence for the offense of armed robbery and a twenty year sentence for the offense of robbery by intimidation. The jury found two statutory aggravating circumstances to authorize the imposition of the death penalty for murder. The jury found the offense of murder was committed while the offender was engaged in the commission of another capital felony, to-wit: armed robbery, as contained in O.C.G.A. § 17-10-30(b)(2) and that the offender committed the offense of murder for the purpose of receiving money, as found in O.C.G.A. § 17-10-30(b)(4). On appeal to the Supreme Court of Georgia, Petitioner's sentences and convictions were affirmed. Young v.

State, 237 Ga. 852, 230 S.E.2d 287 (1976). In its decision on direct appeal, The Supreme Court of Georgia found that the aggravating circumstances found by the jury were supported by the evidence. See Young v. State, supra at 856.

Petitioner subsequently filed a petition for a writ of habeas corpus in state court, which was denied and the denial of state habeas corpus relief was affirmed by the Supreme Court of Georgia in Young v. Ricketts, 242 Ga. 559, 250 S.E.2d 404 (1978), cert. denied, 442 U.S. 934 (1979).

Petitioner then filed an application for federal habeas corpus relief pursuant to 28 U.S.C. § 2254 in the United States District Court for the Middle District of Georgia. On December 5, 1980, the district court entered an order granting the writ of habeas corpus only as it pertained to the imposition of the death penalty, based on the district court's finding that Petitoner's trial attorney deprived him of his Sixth and Fourteenth Amendment rights to reasonably effective assistance of counsel during the sentencing phase of his trial. As an alternative basis, the district court found that Petitioner was sentenced to death based on an improper finding of aggravating cricumstances. Young v. Zant, 506 F. Supp. 274, 280 (M.D. Ga. 1980).

Counsel for both Petitioner and Respondent appealed the order of the district court to the United States Court of Appeals for the Eleventh Circuit. A copy of the brief filed on behalf of the Respondent in the United States Court of Appeals for the Eleventh Circuit is attached as Appendix A to this brief in opposition to the granting of a petition for a writ of certiorari. This brief indicates that the Respondent specifically alleged that the district court had improperly concluded that Petitioner's death sentence was based on an improper finding of aggravating circumstances, because Respondent alleged that the transcript showed that the statutory aggravating circumstances contained in O.C.G.A. § 17-10-30(b)(2) and (b)(4) were supported by the evidence produced at Petitioner's trial.

Following oral argument, the United States Court of Appeals for the Eleventh Circuit found that Petitioner had received ineffective assistance of counsel at both phases of his trial and therefore, granted the writ of habeas corpus with respect to both phases of the trial and reversed the order of the district court. Young v. Zant, 677 F.2d 792 (11th Cir. 1982).

Petitioner was then reindicted in the Superior Court of Greene County for the same offenses for which he was previously tried, i.e., malice murder, armed robbery and armed robbery by intimidation. The district attorney placed counsel for Petitioner on notice of the intention of the state to seek the death penalty utilizing the same two statutory aggravating circumstances as utilized in the original trial and with the additional aggravating circumstance contained in O.C.G.A. § 17-10-30(b)(7). Upon being informed of the intention of the state to seek the death penalty based on these aggravating circumstances, Petitioner filed pleas of double jeopardy with respect to the indictment for armed robbery and with respect to the state's intention to impose the death penalty based on the two original aggravating circumstances and the additional circumstances alleged to be a basis for the imposition of the death penalty by the state.

The trial court denied Petitioner's pleas of double jeopardy in all respects and Petitioner filed an interlocutory appeal to the Supreme Court of Georgia pursuant to O.C.G.A. § 5-6-34(b). The Supreme Court of Georgia upheld the ruling of the trial court denying Petitioner's pleas of double jeopardy, concluding that the effect of the Court of Appeals' reversal of the district court was to "nullify" the opinion of the district court. The Supreme Court of Georgia found no bar to the utilization at Petitioner's retrial on sentencing of the same two aggravating circumstances utilized in Petitioner's first sentencing trial. In a supplemental brief to the Supreme Court of Georgia, the Petitioner raised the allegation that the additional circumstance could not be utilized at the sentencing

phase of Petitioner's resentencing trial, but this allegation was not expressly discussed by the Supreme Court of Georgia in its opinion upholding the denial of the pleas of double jeopardy.

It is from this decision of the Supreme Court of Georgia that Petitioner now seeks review from this Court.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THE SUPREME COURT OF GEORGIA PROPERLY DETERMINED THAT, UNDER THE FACTS OF THIS CASE, THE DOUBLE JEOPARDY CLAUSE DID NOT PREVENT THE UTILIZATION OF TWO STATUTORY AGGRAVATING CIRCUMSTANCES WHICH WERE FOUND TO AUTHORIZE THE DEATH PENALTY AT PETITIONER'S FIRST TRIAL, AS THE CONTROLLING DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DID NOT HOLD THAT THESE AGGRAVATING CIRCUMSTANCES WERE NOT SUPPORTED BY CONSTITUTIONALLY SUFFICIENT EVIDENCE.

Petitioner contends that the double jeopardy clause forbids the state from seeking the death penalty during Petitioner's second trial for the offenses of murder, armed robbery and robbery by intimidation, because the statutory aggravating circumstances utilized were the same two statutory aggravating circumstances utilized at Petitioner's first sentencing trial to authorize the death penalty. Petitioner contends that the district court ruled that there was constitutionally insufficient evidence to support these aggravating circumstances, thus preventing their use at a subsequent retrial as to sentence. While recognizing that the district court had found that the evidence was not legally sufficient to support the jury's finding of the statutory aggravating circumstances contained in O.C.G.A. § 17-10-30(b)(2) and (b)(4), the Supreme Court of Georgia found that it was not bound by the district court's finding with reference to these two aggravating circumstances, so as to prevent the State from

seeking the death penalty based on these same two aggravating circumstances, due to the Supreme Court's interpretation of the subsequent decision of the United States Court of Appeals for the Eleventh Circuit. It should be noted that the Respondent specifically appealed to the United States Court of Appeals for the Eleventh Circuit seeking a reversal of that portion of the district court's order which found these two aggravating circumstances to be unsupported by the evidence. (Appendix A).

The United States Court of Appeals for the Eleventh Circuit did not affirm that portion of the district court's decision finding the evidence to be legally insufficient to support these two aggravating circumstances, but rather, the United States Court of Appeals for the Eleventh Circuit found habeas corpus relief to be warranted based on ineffective assistance of counsel at both the guilt/innocence phase of Petitioner's trial and the sentencing phase of his trial. Young v. Zant, 677 F2d. 792, 798-800 (11th Cir. 1982). Rather, in discussing the claim of ineffective assistance of counsel at the sentencing phase of the trial, the United States Court of Appeals for the Eleventh Circuit merely noted the following with respect to the defense which trial counsel could have mounted concerning the armed robbery charge:

> Turning to the armed robbery, we note the district court, in assessing the sufficiency of the State's evidence of aggravating circumstances on the malice murder charge, concluded that the State did not produce sufficient evidence to permit the jury to find beyond a reasonable doubt that Young had formed the intent to rob Flynt prior to the fatal assault. Young v. Zant, 506 F.2d at 280-281. This deficiency in the evidence should have been sufficiently

> clear to Garland to suggest a strong argument that Young did not rob Flynt by use of an offensive weapon and thus could not be guilty of armed robbery under Ga. Code Ann. § 26-1902.

Id. at 799.

Thus, Respondent submits that the United States Court of Appeals for the Eleventh Circuit did not affirm that portion of the district court's opinion finding as an alternative ground for granting federal habeas corpus relief, that there was legally insufficient evidence to support the two aggravating circumstances. Instead, the court noted that trial counsel could have argued the insufficiency of the evidence to support the armed robbery count and therefore, could have attacked the imposition of the death penalty for murder based on the fact that the murder was committed during the course of armed robbery. Having reviewed the decision of the district court and the United States Court of Appeals for the Eleventh Circuit, the Supreme Court of Georgia correctly made the following observations:

> Rather than reversing in part and affirming in part, the Court of Appeals chose to substitute its opinion for that of the district Court.
>
> We perceive that the effect of this reversal was to nullify the entire opinion of the district court and to place the parties in the position quo ante subject, of course to the holdings of the Court of Appeals. (Cites omitted). It follows that in reviewing the denial of Young's double jeopardy

pleas, we look only to the opinion of the Court of Appeals.

Young v. State, 251 Ga. 153(2), ____ S.E.2d _____ (1983).

Respondent submits that the Supreme Court of Georgia properly found itself governed only by the opinion of the United States Court of Appeals for the Eleventh Circuit in determining whether double jeopardy barred the imposition of the death penalty. Further, Respondent submits that, contrary to the argument of Petitioner under heading III of his brief, that the Supreme Court of Georgia properly interpreted and applied the decision of the United States Court of Appeals for the Eleventh Circuit.

First, the Supreme Court of Georgia disagreed with Petitioner's contention now raised on appeal that the Court of Appeals' reference to the finding of the district court was a holding by the Court of Appeals that the evidence was insufficient to support the second and fourth statutory aggravating circumstances, as well as Petitioner's armed robbery conviction. As already noted, Respondent submits that a review of these two opinions supports the Supreme Court of Georgia's conclusion that the Eleventh Circuit substituted its opinion for the district court and merely referred to the district court's findings, without affirming them. Therefore, as there was no finding of constitutionally deficient evidence to support the aggravating circumstances, there is no basis upon which to invoke the double jeopardy principles cited by Petitioner from Burks v. United States, 437 U.S. 1 (1978), i.e., that if there is insufficient evidence to sustain guilt, retrial of a defendant on the same charge is prevented.

However, the Supreme Court of Georgia went further and assumed the correctness of Petitioner's assertion and noted that the United States Court of Appeal for the Eleventh Circuit had erroneously based its conclusion on an improper construction of the state law as contained in O.C.G.A.

§ 16-8-41. O.C.G.A. § 16-8-41(a) provides that, "A person commits the offense of armed robbery when, with intent to commit theft, he takes property of another from the person or immediate presence of another by use of an offensive weapon . . . ." The Supreme Court of Georgia renewed its original holding made in the direct appeal of Petitioner to that court that without the force utilized by the Petitioner to murder the victim, the robbery would not have occurred and therefore, the murder occurred during the course of an armed robbery under the state court's construction of state law. Young v. State, supra at 117.

The Supreme Court of Georgia properly determined that the evidence in this case with respect to the intent of Petitioner to rob at the time he shot the victim, easily met the test for constitutional sufficiency of the evidence set forth by this Court's decision in Jackson v. Virginia, 443 U.S. 307 (1979). The Supreme Court of Georgia found that the circumstantial evidence in the record established intent to rob at the time of the shooting in accordance with Jackson v. Virginia. The court reaffirmed its earlier holding that the evidence presented in support of the second and fourth statutory aggravating circumstances was legally sufficient. Therefore, the highest court in the state was interpreting the sufficiency of this evidence both under state law and in light of the constitutional standards set forth by this Court in Jackson v. Virginia, and found the evidence presented with respect to the two statutory aggravating circumstances to have been sufficient. Therefore, these two aggravating circumstances could properly be alleged by the state to seek to impose the death penalty at Petitioner's subsequent resentencing trial.

It should be noted that neither the district court nor the United States Court of Appeals for the Eleventh Circuit specifically found that aggravating circumstances (b)(2) and (b)(4) were insufficient under Jackson v. Virginia, supra. Therefore, as there was no constitutional insufficiency found

by either of those courts, the Supreme Court of Georgia properly resolved the question with reference to state law, although concluding on its own, that there was circumstantial evidence in the record to support evidence of intent to rob on the part of the Petitioner at the time of the shooting in accordance with Jackson v. Virginia, supra. As no court has ruled there to be a constitutional insufficiency of the evidence under Jackson v. Virginia, and the controlling Court of Appeals decision granting habeas corpus relief as to sentencing having rested on ineffective assistance of counsel, the Supreme Court of Georgia properly determined that a resentencing of Petitioner utilizing the same two aggravating circumstances originally used to impose the death penalty at Petitioner's first trial was not barred under the double jeopardy clause.

II. GEORGIA LAW DOES NOT PREVENT THE UTILIZATION OF THE ADDITIONAL AGGRAVATING CIRCUMSTANCE NOT UTILIZED AT PETITIONER'S FIRST TRIAL CONTAINED IN O.C.G.A. § 17-10-30(b)(7) IN THE RESENTENCING TRIAL OF PETITIONER.

Petitioner argues in PART II of his petition for a writ of certiorari that the double jeopardy clause forbids the prosecution from utilizing an additional circumstance contained in O.C.G.A. § 17-10-30(b)(7), which was not utilized to impose the death penalty at Petitioner's first sentencing trial. In support of this proposition, Petitioner cites the decision of this Court in Burks v. United States, 437 U.S. 1 (1978). The portion of Burks v. United States, supra, cited by the Petitioner states the proposition that the double jeopardy clause ". . . does not allow 'the State . . . to make repeated attempts to convict an individual for an alleged offense . . . .'". Id. at page 11. However, the Supreme Court of Georgia in

Zant v. Redd, 249 Ga. 211, 290 S.E.2d 36 (1982), found that, "We refrain from equating 'aggravating circumstances' to an offense. (Cites omitted." Id. at 213. In Zant v. Redd, supra, the Supreme Court of Georgia found that this Court's decision in Bullington v. Missouri, 451 U.S. 430 (1981), does not contain language applicable to aggravating circumstances and, " . . . does not mandate a ruling that the failure of a jury to list certain aggravating circumstances in support of the death penalty amounts to an 'acquittal' of those circumstances." Id. at 212.

The recent decision of this Court in Zant v. Stephens, ____ U.S. ____, 103 S. Ct. 2733, 2735 (1983) emphasized the "limited function" served by statutory aggravating circumstances in Georgia's death penalty statute. Therefore, Respondent submits that the state's interpretation of the applicability of this Court's decision in Bullington v. Missouri, supra, to the Georgia death penalty statute controls, so as to allow a prosecutor to add additional aggravating circumstances which may be supported by the evidence offered at the resentencing trial, without violating the double jeopardy clause. See Zant v. Redd, supra at 214. Therefore, this issue presents nothing for review by this Court.

CONCLUSION

For all of the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of certiorari filed on behalf of Charlie Young, Jr. as no substantial federal questions are presented for review by this Court.

Respectfully submitted,

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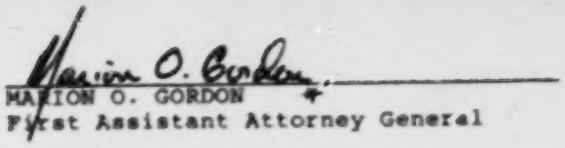
(Signatures continued)



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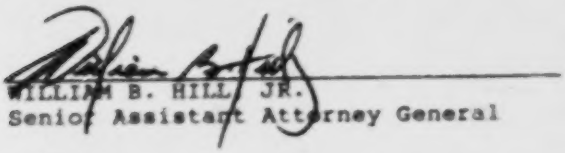

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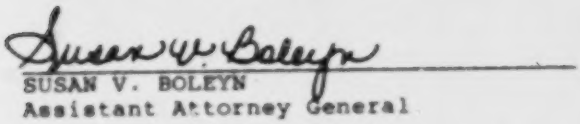

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CERTIFICATE OF SERVICE

I, SUSAN V. BOLEYN, a member of the bar of the Supreme Court of the United States and counsel-of-record for the Respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this brief in opposition for the Respondent upon the Petitioner by depositing a copyof the same in the United States mail with proper address and adequate postage to:

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This 27th day of October, 1983.

Susan V. Boleyn

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Assistant Attorney General

83-5365

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81-7123

WALTER ZANT,

Appellant/Cross-Appellee

v.

CHARLIE YOUNG,

Appellee/Cross-Appellant.

On Appeal from the United States District Court
Middle District of Georgia
Athens Division

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APPENDIX A

REASON WHY ORAL ARGUMENT IS NECESSARY

The Appellant suggests that this case is of such character as to justify oral argument and therefore, it should not be placed on the summary calendar. The Appellee, is presently under a death sentence imposed by the Superior Court of Greene County, Georgia, following his conviction in that court on February 19, 1976 of murder, armed robbery and robbery by intimidation. The lower court granted habeas corpus relief as pertained to the imposition of the death sentence. Appellant contends that the sentence of death should be upheld and the findings of the district court overturned by this Court. Oral argument would assist this Court in determining whether the death sentence was improperly vacated by the district court.

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II. THE DISTRICT COURT ERRED IN HOLDING THAT THE APPELLEE'S DEATH SENTENCE WAS BASED ON AN IMPROPER FINDING OF AGGRAVATING CIRCUMSTANCES CONTAINED IN GA. CODE ANN. § 27-2534.1(b)(2) AND GA. CODE ANN. § 27-2534.1(b)(4) WERE SUPPORTED BY THE EVIDENCE PRODUCED AT APPELLEE'S TRIAL. 21

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Ga. Code Ann. § 27-2534.1 (b)(4). 5, 21, 22

STATEMENT OF THE ISSUES

1.

Whether the district court improperly concluded that Appellee's trial attorney deprived the Appellee of his Sixth and Fourteenth Amendment rights to reasonably effective assistance of counsel during the sentencing phase of his trial?

2.

Whether the district court improperly concluded that Appellee's death sentence was based on an improper finding of aggravating circumstances, as statutory aggravating circumstances used to impose the sentence of death in Appellee's case were supported by the evidence produced at his trial?

STATEMENT OF THE CASE

Appellee/Cross-Appellant, Charlie Young, Jr., was tried in the Superior Court of Greene County on charges of murder, armed robbery and robbery by intimidation on February 17, 18 and 19, 1976. Appellee received the death sentence for the offense of murder, a life sentence for the offense of armed robbery and a twenty year sentence for the offense of robbery by intimidation. On direct appeal to the Supreme Court of Georgia, the Appellee had his sentences and convictions affirmed in Young v. State, 237 Ga. 852 (1976). Appellee did not petition to the Supreme Court of the United States for a writ of certiorari.

The Appellee filed a petition for writ of habeas corpus in the Superior Court of Butts County on June 7, 1977 and subsequently filed two amendments to his petition. A state habeas corpus hearing was held on January 3, 1978. Following this hearing, the Superior Court of Butts County found Appellee's contentions to be without merit and ordered that the writ of habeas corpus be denied on January 31, 1978.

Appellee filed a notice of appeal and an application for a writ of certiorari to the Supreme Court of Georgia on February 28, 1978. The Supreme Court of Georgia granted the application for

a writ of certiorari on July 6, 1978. However, the judgment of the lower court was affirmed and rehearing was denied on November 21, 1978. Appellee subsequently filed a petition for a writ of certiorari in the Supreme Court of the United States, which petition was denied by that court in Young v. Zant, 99 S.Ct. 2870 (1979).

Appellee filed an application for federal habeas corpus relief under 28 U.S.C. § 2254 on November 6, 1979. (R., 4-27). An amended petition for writ of habeas corpus was filed on November 27, 1979. (R., 31-50). An Answer-Response on behalf of the Appellant was filed on January 7, 1980. (R., 59-110).

The district court referred the application for a writ of habeas corpus to the United States Magistrate who entered proposed findings of fact and recommendations for disposition on August 7, 1980. (R., 121-130).

On December 5, 1980, the district court entered an order granting the writ of habeas corpus only as it pertained to the imposition of the death penalty, based on the court's finding that the Appellee's trial attorney deprived him of his Sixth and Fourteenth Amendment rights to reasonably effective assistance of counsel during the sentencing phase of his trial

and on the basis that the Appellee was sentenced to death based on an improper finding of aggravating circumstances. (R. 243-254). It is from these portions of the court's order that the Appellant now seeks review from this Court.

A motion for rehearing was filed on behalf of the Appellant on December 19, 1980, but was denied by that court on January 16, 1981. (R. 255-262). Appellee opposed Appellant's motion for rehearing. (R., 263). A motion to stay the judgment of the court was filed on February 5, 1981 and granted on February 5, 1981. (R. 264-269). A notice of appeal was filed February 5, 1981. (R., 267).

The evidence produced at Appellee's trial will be discussed in connection with the allegations of the Appellant in his present appeal.

SUMMARY OF THE ARGUMENT

1.

The district court improperly concluded that Appellee should be resentenced due to alleged ineffective assistance of counsel during the sentencing phase of his trial, citing Fitzgerald v. Estelle, 504 F.2d 1334 (5th Cir. 1974). Appellee's constitutional rights were not violated due to ineffective assistance of counsel during the sentencing phase of the trial and the proper standard to be applied was recently set forth by the Supreme Court of the United States in Cuyler v. Sullivan, 446 U.S. 335 (1980).

2.

The district court improperly concluded that Appellee's death sentence was based on an improper finding of aggravating circumstances, as the transcript, when viewed as a whole, shows that the statutory aggravating circumstances contained in Ga. Code Ann. § 27-2534.1(b)(2) and Ga. Code Ann. § 27-2534.1(b)(4) were supported by the evidence produced at Appellee's trial.

ARGUMENT AND CITATION OF AUTHORITY

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE APPELLEE SHOULD BE RESENTENCED BASED ON ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE SENTENCING PHASE OF THE TRIAL.

The district court concluded that the Appellee's attorneys afforded him reasonably effective assistance of counsel during the investigative stage before trial, during the pretrial proceedings and jury selection and during the guilt/innocence phase of the trial. However, the district court concluded that the Appellee did not receive the reasonably effective assistance of counsel during the sentencing stage of the trial. (R., p. 248). The factors upon which the court based this decision were as follows, "the court concludes that Mr. Garland's ignorance of Georgia capital sentencing procedures, his failure to present any mitigating evidence during the sentencing phase of the trial, and his refusal to allow Petitioner to take the stand during the sentencing phase in his own behalf, viewed together, deprived Petitioner during the sentencing phase of

his trial for murder of his Sixth and Fourteenth Amendment rights to reasonably effective assistance of counsel." (R. 252). The court's conclusion when viewed in light of the appropriate standard was erroneous and was directly contrary to the finding of the Supreme Court of Georgia in its review of Appellee's state habeas corpus proceedings. See Young v. Ricketts, 242 Ga. 559, 560-561 (1978).

The district court properly utilized the standard of MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), of counsel "reasonably likely to render and rendering reasonably effective assistance" for determining whether or not a defendant's Sixth Amendment right to counsel has been violated. However, it should be noted that this Court in MacKenna v. Ellis, supra, went further and stated that in determining whether a particular defendant received the effective assistance of counsel, the actions of counsel should not be judged in hindsight, nor must counsel have been errorless in order to be effective.[1/]

1/ Georgia courts have used language similar to that utilized by this Court in interpreting the constitutional right to assistance of counsel by stating that this right "does not guarantee errorless counsel nor counsel judged ineffective by hindsight." See Jones v. State, 232 Ga. 771 (1974); Hawes v. State, 231 Ga. 638, 639 (1974); Fortson v. State, 240 Ga. 5 (1977).

It should be noted that the Appellee's family retained Mr. Reuben A. Garland to represent the Appellee on the charges set forth in the indictment returned by the grand jury of Greene County, Georgia. (State habeas corpus transcript, pp. 33; 57). [2/] Mr. Garland had long been an outstanding attorney as he had been admitted to the bar in 1920. (State habeas corpus order, p. 2 and H.C.T., p. 85). Mr. Garland was assisted by Mr. Frank Petrella (H.C.T., pp. 94-101). Mr. Petrella generally acted as an assistant to Mr. Garland throughout Appellee's trial. (H.C.T., pp. 124-141).

An excellent summary of the evidence produced against the Appellee at trial is contained in the original decision of the Supreme Court of Georgia and Appellee's direct appeal to that court. See Young v. State, 237 Ga. 852, 853-854 (1976). In Sumner v. Mata, 101 S.Ct. 764 (1981), the Supreme Court of the United States determined that 28 U.S.C. § 2254(d) applies to federal determinations made by state courts, whether the court

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[2/] References to the state habeas corpus transcript will hereinafter be designated as "H.C.T." followed by the page number.

be a trial court or an appellate court. Thus, the factual finding of the Supreme Court of Georgia in Appellee's state habeas corpus hearing are presumed to be correct under 28 U.S.C. § 2254(d).

Briefly summarized, the Supreme Court of Georgia found that the Appellee made a statement to police and F.B.I. agents, after having been advised of his constitutional rights. The statement essentially consisted of the following information: Appellee and his nephew, Derwin Young, drove from Atlanta to Union Point, Georgia on December 15, 1975. The Appellee was carrying a .22 caliber pistol in a paper bag in the car. The Appellee first drove to the Farmers Bank and then to the house of the Vice President of the bank, Reuben Flynt. He then drove back to the bank and then returned to Flynt's house. The Appellee went inside the house while his nephew remained outside in the car. The stated purpose of the Appellee in visiting Flynt was to discuss two outstanding loans which he had at the Farmers Bank.

Although the Appellee attempted to enter Flynt's home, Flynt told him to come back and see him in thirty minutes. The Appellee returned to the car and having gotten his .22 caliber pistol went

inside the victim's house and requested the use of the telephone to make a call. After unsuccessfully attempting to call his grandmother, the Appellee again began discussing the outstanding loans with the victim. An argument began, followed by a struggle during which Flynt was hit at least once by the Appellee. The Appellee fired several times at Flynt with the gun and hit him at least once, firing several times at close range. The Appellee ripped the phone from the wall, removed the victim's billfold from his rear pants pocket and then hit him again several times with the gun and possibly another object. It was at this juncture that the Appellee got the idea of trying to get money from the bank. The Appellee stated at the time he left Flynt's house, he did not know whether or not Flynt was dead, although he thought he had killed him.

The Appellee and his nephew drove to the bank and attempted to extort $60,000.00 from a teller. When police were alerted, the Appellee fled and was arrested at his grandmother's house. The .22 caliber pistol was discovered beneath the driver's seat of the car driven by him. The bullets removed from Mr. Flynt's body were fired from the .22 caliber pistol found in the car driven by the Appellee. The evidence also revealed that the victim had two lacerations across his forehead, as well as having received

lacerations on the left side of his chin, and in the back of the scalp, showing that the victim had been hit several times with the butt of the gun. The Supreme Court of Georgia noted that the victim had apparently survived for some period after the infliction of the wounds, but finally died from a loss of blood. See Young v. State, 237 Ga. 852, 854 (1976).

The Supreme Court of Georgia further noted in its decision reviewing the order of the state habeas corpus court denying the Appellee habeas corpus relief that the Appellee voluntarily answered all the questions of law enforcement officials concerning the details of the killing of Reuben Flynt after having been read all of his rights, and even now, does not claim that the statement was involuntary or coerced. See Young v. Ricketts, 242 Ga. 559 (1978). Mr. Garland's performance during the sentencing phase of the Appellee's trial, must be viewed in light of the overwhelming evidence produced at trial of the Appellee's guilt, including, as noted by the Supreme Court of Georgia, Petitioner's own statement to the investigating authority (trial transcript, p. 273-374) and evidence recovered from the automobile driven by the Appellee, including the weapon identified as having fired the bullets which killed the victim. (T. 473-474; 476).

Although the district court concluded that Mr. Garland's alleged ignorance of Georgia capital sentencing procedures rendered him ineffective during the sentencing phase, the Appellant submits that Mr. Garland was hampered in presenting evidence on the Appellee's behalf during the sentencing phase, and arguing from that evidence, not due to any confusion over the bifurcated nature of the trial, but rather due to the Appellee's inability to provide Mr. Garland with useful information or witnesses to present during this phase of trial. In fact, Mr. Garland testified at the state habeas corpus hearing that the Appellee never provided him with the names of any witnesses that he could use at the trial. (H.C.T., p. 89). The Appellee himself admitted that he only provided Mr. Garland and Mr. Petrella with the name of one possible witness and that her name was on the state's witness list. (H.C.T., p. 47-48).

The district court found that Mr. Garland was ineffective because he introduced no evidence on the Appellee's behalf at the sentencing hearing. However, even the district court noted that some mitigating evidence came in during the guilt/innocence phase of the trial, specifically the fact that the Appellee lacked prior convictions and the fact that the Sheriff of Greene County had given the Appellee a favorable job reference. (R., p. 249).

Mr. Garland therefore did attempt to develop mitigating evidence on the Appellee's behalf by questioning witnesses concerning the fact that the Appellee had no prior criminal record more serious than traffic violations, that he was of good character before the crime, and that the Sheriff of Greene County had given him a previous written recommendation. (Trial transcripts, p. 380; 382; 385-386). As previously noted, if, in fact, there were other mitigating factors which could have been presented on the Appellee's behalf, this evidence was not communicated by the Appellee to his attorneys. The Appellant respectfully disagrees with the district court that Mr. Garland was ineffective for failing to present other witnesses as to the Appellee's good employment record or general good character, as this had been brought out during the guilt/innocence phase. It appears that further evidence would merely have been cumulative and achieved no useful purpose at this stage of the Appellee's trial.

The district court also found that the Appellee's retained attorney was ineffective during the sentencing phase by his refusal to allow the Appellee to take the stand in his own behalf during the sentencing phase of the trial. The Supreme Court of Georgia specifically dealt with this allegation in the Appellee's appeal from denial of state habeas corpus relief. Young v. Ricketts, 242 Ga. 559(1)(c)(1978). The Supreme Court of Georgia

initially noted that cases which hold that the right of a person to testify in their own behalf being a constitutionally guaranteed personal right, which cannot unilaterally be waived by counsel are still in the minority. In making this statement, the Supreme Court of Georgia noted the decision of this Court in Winters v. Cook, 489 F.2d 174, 179(6) (5th Cir. 1973), in which this Court stated that among those rights which cannot unilaterally be waived by counsel is "perhaps" the right to testify personally. However, the Supreme Court of Georgia noted that in Winters v. Cook, supra, this "perhaps" was not carried forward and therefore, neither would the Supreme Court of Georgia carry it forward in their opinion. Young v. Ricketts, 242 Ga. 559, 560 (1978).

The Supreme Court of Georgia cited numerous federal cases for the proposition that contentions relating to retained counsel advising a petitioner as to whether or not to take the stand, involves a question of trial strategy. One of the cases cited by the Supreme Court of Georgia was Hayes v. Russell, 405 F.2d 859 (6th Cir. 1969). In Hayes v. Russell, supra, the Court of Appeals for the Sixth Circuit stated that whether or not privately retained counsel should advise a defendant to take the witness stand at trial, was a question of trial strategy. The district court, citing Winters v. Cook, supra, as the case in which

this Court held that the right to testify can only be waived by the defendant and not by his attorney, found that Mr. Garland's failure to allow the Appellee to testify during sentencing, could not be justified on the basis that this was a matter of "trial strategy." The Appellant submits that the district court was clearly in error in making this determination.

First, as noted by the Supreme Court of Georgia, there was evidence produced at the state habeas corpus proceeding that Mr. Garland told the Appellee he would not be permitted to take the stand in his own behalf. (H.C.T., p. 20-21). Associate counsel, Frank Petrella, testified at the state habeas corpus hearing that Mr. Garland had told him that no good would come of letting the Appellee testify because his testimony might inflame the jury and "just hack them off." (H.C.T., p. 130).

The Supreme Court of Georgia also noted that Mr. Garland had consistently argued throughout the trial that the Appellee was "crazy" and not responsible when he murdered the victim. The Supreme Court of Georgia noted that evidence produced at the Appellee's trial had shown him to be "articulate, college-trained and alert." See Young v. Ricketts, 242 Ga. 559, 560 (1978). It can therefore be argued that to allow the Appellee to take the stand, would destroy whatever impression Mr. Garland had pursued

throughout the trial as to Mr. Young's incompetence, by showing him to be intelligent and responsible. Thus, to allow the Appellee to take the stand might negate the impression which Mr. Garland had been attempting to establish through the trial, thereby, erasing any mitigating evidence which had been previously presented on the Appellee's behalf.

The district court makes much of the fact that the Appellee did testify before being sentenced by the ccurt in accordance with the recommendation of the jury, concluding that the statement, if given prior to the jury's consideration of sentence, could have "had a substantial impact" on the jury's decision concerning penalty. However, the Supreme Court of Georgia noted that this statement by the Appellee was ". . . cumulative of character evidence already introduced by counsel during trial, in which he urged he was of good character before the crime; had a family and did not want anyone to believe he was a robber, murderer, extortionist or thief who had to steal, even though the verdict characterized him that way." As this statement was merely cumulative of evidence which the Appellee's attorney had brought out during the guilt/innocence phase of the trial, it is difficult to see how the district court reached the conclusion that the failure to

allow the Appellee to make a similar statement on his behalf during the sentencing phase, constitutes ineffective assistance.

The Appellant respectfully submits that the conclusion of the Supreme Court of Georgia that it was a matter of sound trial strategy for Mr. Garland not to call the Appellee to the stand, is authorized by the evidence and that the district court improperly used this as a factor upon which to base a finding of ineffective assistance of counsel during the sentencing phase.

The district court cites Gregg v. Georgia, 428 U.S. 53 (1976), for the proposition that a defendant should be accorded substantial latitude as to the types of evidence which may be introduced at the sentencing phase of the trial. However, Gregg v. Georgia, supra, also noted that "evidence considered during the guilt stage may be considered during the sentencing stage without being resubmitted. Eberheart v. State, 232 Ga. 247, 253, 206 S.E.2d 12, 17 (1974)." Id. at 164. Therefore, the fact that mitigating evidence produced on the Appellee's behalf was not resubmitted during the sentencing phase, does not constitute ineffective assistance of counsel. Further, the principles of Lockett v. Ohio, 438 U.S. 586 (1978), were not violated in the instant case. The

holding of Lockett v. Ohio, supra, was merely that to meet constitutional requirements, a death penalty statute must not preclude consideration of any relevant mitigating factors. Relevant mitigating factors were presented during the guilt/innocence phase and the jury was not precluded from considering any mitigating factors and therefore, no violation of Lockett v. Ohio, supra, operates to serve as the basis for a finding of ineffective assistance.

Finally, the district court concluded that the proper test by which to judge Mr. Garland's effectiveness was that set forth by this Court in Fitzgerald v. Estelle, 504 F.2d 1334 (5th Cir. 1974), and recently affirmed by this Court in United States v. Guerra, 628 F.2d 410 (5th Cir. 1980). United States v. Guerra, supra, does indeed cite the standard for evaluating the conduct of retained counsel which was enunciated in Fitzgerald v. Estelle, supra. Having cited Fitzgerald v. Estelle, supra, this Court then stated, "see also Cuyler v. Sullivan, ___U.S.___, 100 S.Ct. 1708, 1715, 64 L. Ed.2d 333, 343 (1980)." This reference to Cuyler v. Sullivan, indicated a recognition by this Court that although the standard of Fitzgerald v. Estelle, supra, i.e., that a state prisoner can only win a federal writ of habeas corpus upon a showing that a state participated in the

denial of a fundamental right protected by the Fourteenth Amendment, this Court also recognized that the Supreme Court of the United States had determined that:

> "Since the state's conduct of a criminal trial itself implicates the state in the defendant's conviction, we see no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers."

Cuyler v. Sullivan, at 64 L.Ed. 2d 333, 344 (1980).

Therefore, the fact that Mr. Garland was retained, or that the trial judge allegedly should have been aware of his error and taken corrective action, are not factors which under the standard of Cuyler v. Sullivan, would determine whether the Appellee received the effective assistance of counsel. Under the present standard, the main consideration must be whether or not counsel's representation rendered the proceedings fundamentally unfair in violation of the Appellee's due process rights. The Appellant respectfully contends that on the basis of the above

and foregoing reasons, the Appellee's right to a fundamentally fair trial was not violated during the sentencing phase of the trial based on any alleged ineffectiveness of his trial attorney. Therefore, the decision of the lower court, granting the Appellee a new sentencing hearing should be reversed.

II. THE DISTRICT COURT ERRED IN HOLDING THAT THE APPELLEE'S DEATH SENTENCE WAS BASED ON AN IMPROPER FINDING OF AGGRAVATING CIRCUMSTANCES, AND THE AGGRAVATING CIRCUMSTANCES CONTAINED IN GA. CODE ANN. § 27-2534.1(b)(2) AND GA. CODE ANN. § 27-2534.1(b)(4) WERE UNSUPPORTED BY THE EVIDENCE PRODUCED AT APPELLEE'S TRIAL.

The district court concluded that the evidence was not legally sufficient to support the jury's finding beyond a reasonable doubt that the Appellee committed the murder in the course of an armed robbery for the purpose of obtaining money, statutory aggravating circumstances contained in Ga. Code Ann. § 27-2534.1(b)(2) and Ga. Code Ann. § 27-2534.1(b)(4). (R., p. 252). The district court concluded that as it had found that the Appellee was sentenced to death based on an improper finding of aggravating circumstances, that he should be resentenced. (R., p. 253). The Appellant contends that the district court

erred in this portion of its order and filed a motion for rehearing in the district court asking that the court reconsider this finding. (R., p. 255-262). The motion for rehearing was denied by the district court on January 16, 1981. (R., p. 255).

As contended in the motion for rehearing, Appellant respectfully submits that the transcript of the Appellee's trial, when viewed as a whole, shows that the statutory aggravating circumstances contained in Ga. Code Ann. § 27-2534.1 (b)(2) that the murder was committed during the course of an armed robbery and Ga. Code Ann. § 27-2534.1(b)(4) that the murder was committed for the purpose of obtaining money, were fully supported by the evidence produced at the Appellee's trial.

The evidence produced at the Appellee's trial has already been summarized in I. of this brief. It should be reemphasized that the Appellee shot Mr. Flynt during a discussion concerning two outstanding loans which the Appellee had at the bank where Mr. Flynt worked. The Appellee fired several times at Mr. Flynt and hit Flynt several times with a gun and possible another object. After Flynt was lying on the floor, the Appellee removed Flynt's billfold from his rear pocket and then decided he would try to obtain money from the bank where Flynt worked. (Trial transcript, p. 372-374). The Appellee specifically stated that at the time

he left Flynt's house, he did not know whether or not Flynt was dead, although he believed that he had killed him. (Trial transcript, p. 374). The Appellee removed Flynt's billfold from his rear pocket, immediately after the shooting as Flynt lay on the floor. The evidence produced at the Appellee's trial reveals that the murder and armed robbery, as well as the attempt to extort money from a teller at the bank where Flynt worked, were part of a continuous transaction by the Appellee.

It is not significant, contrary to the holding of the district court, that the Appellee may not have contemplated the taking of the money until after the shots had been fired and the blows struck. This is evidenced by numerous cases decided by the Supreme Court of Georgia.

In Moore v. State, 233 Ga. 861 (1975), the Supreme Court of Georgia considered the contention of a person under the death sentence that there was no aggravating circumstance supported by the evidence in his case, because allegedly a person could not be guilty of armed robbery if the victim was unconscious or dead at the time of the robbery. In Moore v. State, supra, the defendant fired five shots at the victim and the victim subsequently died from two bullet wounds he received in the chest.

After shooting the victim, the defendant removed two billfolds from the victim's pocket and took the victim's shotgun. The Supreme Court of Georgia found that without the force used by the defendant in Moore v. State, supra, the taking of the billfolds and the shotgun from victim Stapleton would not have been accomplished. The Supreme Court noted, ". . . that Stapleton died from the force used either immediately or subsequently to the taking, does not make the offense any less a robbery." Id. at 864.

Similarly, in the instant case, the fact that it is uncertain whether or not the victim was dead prior to the time that the Appellee stole his billfold, does not affect the use of the commission of the armed robbery as an aggravating circumstance. As in Moore, supra, the taking of the victim's billfold from his pocket would not have been accomplished without the force which was also used to shoot and beat the victim. As previously stated, the murder and the armed robbery were part of a continuous transaction by the Appellee in the space of a few minutes at the victim's home and whether or not the death of the victim preceded the armed robbery does not affect the use of the armed robbery as a statutory aggravating circumstance. The distinction drawn by the district court was an erroneous one.

In Berryhill v. State, 235 Ga. 549 (1975), the Supreme Court of Georgia also upheld the aggravating circumstance of armed robbery used to authorize the death penalty when the defendant, after having shot the victim five times, robbed the defendant's wife. Id. at 555.

As to the resulting attempt to obtain money from the bank where Flynt worked by seeking to obtain $60,000.00 in exchange for Flynt's life, it can again be argued that this was part of a continuous transaction by the Appellee and an act which would not have been attempted, if force had not already been used against the victim with the result that the Appellee believed the victim to be dead at the time of the attempt to obtain money from the bank.

It should be noted that in the decision of the Supreme Court of Georgia reviewing the decision of the state habeas corpus court, the Supreme Court stated, "we no longer permit a death penalty for armed robbery alone (cites omitted), but where the armed robber kills the victim, the armed robbery is properly before the jury as an aggravating circumstance from which a sentence of death can result. Code Ann. § 27-2534.1. Peek v. State, 239 Ga. 422, 432 (238 S.E.2d 12) (1977); Bowden v. State, 239 Ga. 821, 829 (238 S.E.2d 905)(1977)." Young v. Ricketts, 242 Ga. 559, 562 (1978).

It is apparent that under the Supreme Court of Georgia's interpretation of the statutory aggravating circumstance contained in Ga. Code Ann. § 27-2534.1(b)(2), that the commission of the other capital felony, in this case armed robbery, need not occur prior to the murder in order to authorize a death sentence which utilizes this statutory aggravating circumstance. Therefore, the district court improperly interpreted Georgia law in finding that there was insufficient evidence to support this aggravating circumstance and the aggravating circumstance contained in Ga. Code Ann. § 27-2534.1(b)(4).

The Appellant asserts that there was sufficient evidence to support both aggravating circumstances and that Appellee did not be resentenced. However, assuming for the sake of argument, that this Court should find one of the two aggravating circumstances to be unsupported by the evidence, the remaining aggravating circumstance could still be utilized to authorize the death sentence in the instant case, without resentencing the Appellee. Dampier v. State, addendum, 245 Ga. 882 (1980); Burger v. State, 245 Ga. 458, 460-61 (1980); Gates v. State, 244 Ga. 587, 599 (1979), cert. denied, ___U.S.___, 100 S.Ct. 1332 (1980). Therefore, the district court's holding was in error.

CONCLUSION

For all the above and foregoing reasons, that portion of the district court's order finding that the Appellee should be resentenced due to alleged ineffective assistance of counsel during the sentencing phase and an improper finding of aggravating circumstances, should be reversed by this Court.

Respectfully submitted,

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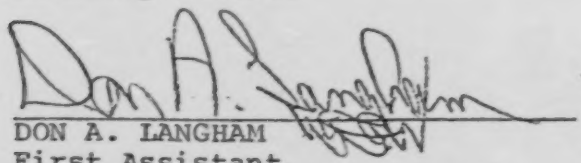

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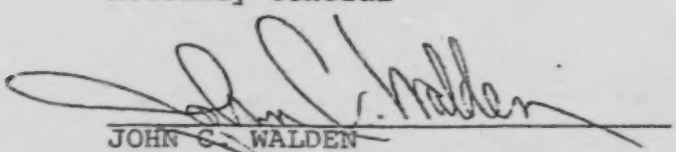

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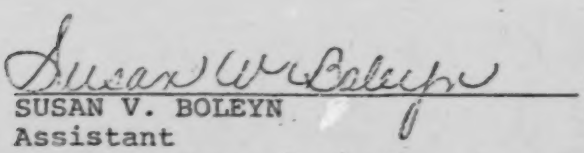

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CERTIFICATE OF SERVICE

This is to certify that I have this day mailed a true and correct copy of the foregoing Brief for Appellant/Cross-Appellee to Appellee/Cross-Appellant's attorney by depositing a copy of same in the United States mail with sufficient postage affixed thereto and addressed to:

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